No. 17-1625

In The
Supreme Court of the United States

RIMINI STREET, INC., AND SETH RAVIN,
Petitioners,
v.
ORACLE USA INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR PATRICK T. GILLEN IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, Professor Patrick T. Gillen, is an Associate Professor of Law at Ave Maria School of Law. Professor Gillen's interest in this case stems from his work as a civil rights litigator and a scholar who has written on the history and scope of the federal cost-shifting statutes. The purpose of this brief is to demonstrate that the American Rule provides the backdrop for Congress's carefully crafted scheme governing recovery of costs in the federal system, including costs recoverable under the Copyright Act.*

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* No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae made a monetary contribution to fund its preparation or submission. Counsel for all parties have blanket consented to the filing of amicus briefs.

SUMMARY OF ARGUMENT

To resolve what types of costs a district court may award under § 505 of the Copyright Act, this Court's decision in *Crawford Fitting* prescribes a simple test: does the Act *explicitly* authorize shifting of expert fees, discovery expenses, or any other item of nontaxable expense? *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Because the answer is clearly no, federal courts in copyright cases "are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.*

On its surface, the Court's *Crawford Fitting* decision was an exercise in statutory interpretation. "As always," the Court explained, "[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* (citation omitted). Thus, applying the tools of statutory analysis, the Court held that Article III courts are not "empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede those sections." *Id.*

As this brief explains, *Crawford Fitting*'s clear-statement requirement also rests upon another, more fundamental basis: the "American Rule." The American Rule is a presumption—followed by American courts from the earliest days of our Republic—that litigants bear their own fees and expenses except for a small set of relatively minor costs incident to the judgment. Early courts rejected England's "loser pays" preference in favor of the American Rule to

ensure the courts would be open to all citizens, including those of modest means. *See, e.g.*, *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (per curiam) (recognizing that the "general practice of the United States is in opposition to" shifting attorneys' fees to the losing party); *Potts v. Imlay*, 4 N.J.L. 330, 332 (1816) (recognizing that the legislature "wisely" limited the litigation expenses a prevailing party may recover to a small subset of "all his necessary expenses, both of time and money," to ensure that "[t]he courts of law are open to every citizen"). Even more fundamentally, early courts recognized that it is the legislature's job to set policy and the courts' job to apply the law.

The American Rule developed in these early decisions provided the backdrop for two centuries of interplay between Congress and the courts, resulting in a carefully calibrated system in which Congress has defined and limited the types and amounts of costs that prevailing parties may recover. *See generally* Patrick T. Gillen, *Oppressive Taxation: Abuse of Rule 54 and Section 1920 Threatens Justice*, 58 Wayne L. Rev. 235 (2012) (detailing the scheme for cost recovery contained in the Federal Rules of Civil Procedure and related statutes). Over the years, Congress has on occasion made the policy choice to depart from the American Rule's default by authorizing courts in particular statutes to shift the prevailing party's attorneys' fees, expert fees, or other nontaxable expenses to the loser—but it is Congress's job to do so, and to do so explicitly.

Consequently, the American Rule provides the broader context needed to resolve this case. Aside from allowing courts to award a "reasonable attorney's fee," Congress has not explicitly authorized courts to award any item of nontaxable expense in copyright cases. 17 U.S.C. § 505. Section 505's bare reference to "full costs" does not authorize a radical departure from the American Rule, or from the carefully crafted exceptions to that rule embodied in the federal costs statutes, for the simple reason that Congress does not "hide elephants in mouseholes." *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018) (citation omitted). Worse still, the Ninth Circuit's misuse of § 505 to tax millions of dollars in expert fees, consultant fees, and e-discovery costs threatens access to federal courts. The decision below is wrong as a matter of law and policy.

ARGUMENT

I. Under the longstanding American Rule, litigants presumptively bear their own legal fees and expenses.

Since the beginning of the Republic, this Court has recognized what is now known as the "American Rule." The rule provides that a prevailing litigant ordinarily may not collect attorneys' fees and nontaxable expenses from the loser unless Congress explicitly says so.

In England, costs were not allowed at common law. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). But from as early as the 13th century, a series of English statutes have expressed Parliament's decided preference for shifting litigation expenses, including attorneys' fees, to the losing party. *Id.* at 247 & n.18. This "loser pays" preference is known as the "English Rule."

In America, Congress and the courts diverged from English practice. Shortly after ratification of the Constitution, Congress authorized federal courts in most cases to follow the cost- and fee-shifting practices of the forum state. *Id.* at 247-48 & n.19; *see, e.g.*, Act of Mar. 1, 1793, ch. 20, § 4, 1 Stat. 333 (providing that "there be allowed and taxed in the [federal courts], in favour of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attornies and counsellors' fees, except in the district courts in cases of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states"). But those early statutes were short lived. By 1800, they had all "either expired or been repealed." *Alyeska*, 421 U.S. at 249.

Against this backdrop of on-again, off-again legislation, this Court first recognized the American Rule in 1796. Reversing "a charge of 1600 dollars for counsel's fees" awarded to the prevailing party, this Court explained:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and

> even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.

Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (per curiam); *accord Stimpson v. The Railroads*, 23 F. Cas. 103, 104-05 (1847) (No. 13,456) (citing *Arcambel* to show that "the best authority" supports the rule that a "defendant's delinquency" is not "measured by the expenses of the plaintiff in prosecuting the suit"); *Whittemore v. Cutter*, 29 F. Cas. 1120, 1123 (C.C.D. Mass. 1813) (No. 17,600) (citing *Arcambel* as authority that "the extraordinary expenses of vindicating the right of the plaintiffs, such as counsel fees and expenses of witnesses beyond the taxable costs, ought" not be awarded). And ever since, "[t]his Court has consistently adhered to that early holding." *Alyeska*, 421 U.S. at 250 (citing cases).

More than fifty years later, Congress reinforced and standardized the American practice recognized in *Arcambel* by passing the 1853 Fee Act—a "far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts." *Id.* at 251-52. For example, the Act allowed the prevailing party to recover $5 to $20 for the proctor's docket fee, $2.50 for each deposition admitted into evidence, $5 for cases appealed to the circuit court, and fees for "exemplifications and copies of papers necessarily obtained for use on trial." Act of Feb. 26, 1853, ch. 80, 10 Stat. 161-162, 168.

The 1853 Act replaced the prevailing system in which, lacking any direction from Congress, federal courts had continued to borrow home state rules for awarding costs. *Alyeska*, 421 U.S. at 250. As Senator Bradbury noted in urging adoption of the Act, "[t]here [we]re no two States where the allowance [wa]s the same." *Id.* at 251 n.24 (quoting Cong. Globe, 32d Cong., 2d Sess. app. 207 (1853)). As a result, "[o]ne system prevail[ed] in one district, and a totally different one in another." *Id.* (citation omitted). In some States, little or no fees were taxable to the losing party. *Id.* (citation omitted). In other States, the fees "swelled to an amount exceedingly oppressive to suitors" and "altogether disproportionate to ... the labor bestowed." *Id.* (citation omitted). The Act put a stop to this disparate state-by-state approach by streamlining the taxation of fees and "prescribing a limited number of definite items to be allowed." *Id.* (citation omitted).

Congress's intent to limit taxable costs and fees was then, in turn, "repeatedly enforced by this Court." *Id.* at 253. In one early case, for example, the Court set aside a $500 allowance for counsel's fees, reasoning that "[f]ees and cost ... are now regulated by the act of the 26th of February, 1853," which provides that "the following and no other compensation shall be allowed." *The Baltimore*, 75 U.S. (8 Wall.) 377, 392 (1869); *see also Alyeska*, 421 U.S. at 253-55 (citing additional examples).

Over the years, the Fee Act has been amended and recodified "without any apparent intent to change the controlling rules," and now finds its home in 28

U.S.C. § 1920 and related statutes. *See Alyeska*, 421 U.S. at 255-57 & nn.26-29. *See generally* Gillen, *supra*, at 253-56 (detailing how the federal costs statute evolved from 1853 to the present). Like their 1853 forebear, these present-day cost statutes limit taxable costs to a narrowly defined list of expenses such "as clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 573 (2012).

Thus, consistent with the American Rule, Congress has for more than a century and a half limited taxable costs to "relatively minor, incidental expenses" that are often "a fraction of the nontaxable expenses borne by litigants for attorneys, experts, consultants, and investigators." *Id.*

II. The American Rule grew out of judicial reluctance to chill good-faith litigation without direction from Congress.

Early American courts rejected the English Rule for many reasons, but a few dominant reasons emerged. *See* Peter Karsten & Oliver Bateman, *Detecting Good Public Policy Rationales for the American Rule: A Response to the Ill-Conceived Calls for "Loser Pays" Rules*, 66 Duke L.J. 729, 737-48 (2016). Some judges expressed concerns that a "loser pays" rule would limit the ability of those who are less wealthy to advance meritorious claims for fear of ruinous liability if they lost. Others worried that by expanding the concept of damages or writing new categories of costs into the cost statutes, courts

usurped Congress's role. Fundamentally, judges believed the English Rule was inconsistent with American principles and institutions.

As already mentioned, this Court touched off the discussion in 1796 when it rejected a prevailing party's argument that attorneys' fees "might fairly be included under the idea of damages." *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (per curiam). After noting that "[t]he general practice of the United States is in opposition to it," the Court recognized that reversing the traditional approach would be up to Congress, not the Court. *Id.* "[E]ven if that practice were not strictly correct," the Court explained, "it is entitled to the respect of the court, till it is changed, or modified, *by statute*." *Id.* (emphasis added).

Over the course of the 19th century, state and federal courts continued to develop the rule first articulated by this Court. Twenty years after *Arcambel*, the New Jersey Supreme Court of Judicature reversed a verdict awarding $50 to the plaintiff to compensate him for the defendant's "malicious prosecution" of two small causes. *Potts v. Imlay*, 4 N.J.L. 330, 331 (1816). According to Chief Justice Kirkpatrick, the lower court had overstepped its role: "If we were legislators, indeed, perhaps we should be inclined to say that the costs, in all cases where costs are given, should completely indemnify the party for all his necessary expenses, both of time and money." *Id.* at 332. But "in this state," he added, "those to whom this high trust is committed ... have wisely thought otherwise." *Id.* Unlike in England, where courts have discretion to award fees and

expenses based on "the circumstances of the case," "[t]he courts of law [in America] are open to every citizen," and the costs "fixed by statute" are "the only penalty the law has given against a plaintiff for [unsuccessfully] prosecuting a suit in a court of justice." *Id.*

In 1847, Circuit Justice Grier reversed a jury verdict premised on an instruction that permitted the jury, "if they saw fit," to "allow the plaintiff as part of his actual damages any expenditures for counsel fees or other charges which were necessarily incurred to vindicate the rights derived under his patent and are not taxable in the bill of costs." *Stimpson v. The Railroads*, 23 F. Cas. 103, 103-04 (1847). In language mirroring *Crawford Fitting*'s clear-statement rule, Justice Grier reasoned that "[t]here is certainly nothing in the [patent statute], or in the phrase 'actual damages,' which it uses, to countenance the doctrine" of allowing the plaintiff to recover attorneys' fees and nontaxable expenses. *Id.* at 104. If allowed, the alleged infringer would "truly be said to be ... at the mercy both of court and jury." *Id.* Awarding costs beyond those set by law would, in short, "work inequality and injustice." *Id.* at 105.

The next year, the Pennsylvania Supreme Court rejected a similar instruction allowing the jury to award not only "nominal damages" (for the disruption of the plaintiff's mill caused by the defendant's dam) but also "damages sufficient to compensate the plaintiff for ... the trouble and expense of establishing his right." *Good v. Mylin*, 8 Pa. 51, 52-53 (1848). "No lawsuit," the court explained, "is

prosecuted without trouble and expense; and were compensation for these recoverable, ... the claim would be a standing dish." *Id.* at 56. Giving the trier of fact unfettered discretion to make "every successful plaintiff" entirely "whole" would "be without bound or limit" and would be "contrary to the genius of the common law, which does not give even costs." *Id.* at 55-56.

Invoking similar concerns, the Massachusetts Supreme Judicial Court disallowed a jury's award of $350 in attorneys' fees to the prevailing party. *Reggio v. Braggiotti*, 61 Mass. (7 Cush.) 166, 168 (1851). The fees, the court wrote, were "incurred by the party for his own satisfaction." *Id.* at 170. The court thus concluded "that it would be dangerous to permit [the prevailing party] to impose such a charge upon an opponent," contrary to the law, which "measures the expenses incurred in the management of a suit by the taxable costs." *Id.*

The Louisiana Supreme Court reached the same conclusion. Reversing a verdict awarding the defendant $150 for expenses and time "in preparing his defence," Chief Justice Merrick explained:

> It is desirable that the courts of justice should be open to all men, and that suitors should not be deterred from pursuing their rights through fear that they should be compelled to pay for the loss of time of their adversary, nor from using, in good faith, the process of the court and the means of redress

> prescribed by law, through apprehensions that they should be [liable for] vindictive damages, if from any unforeseen cause, they should fail in their action.

Osborn v. Moore, 12 La. Ann. 714, 714 (1857); *accord Burruss v. Hines*, 26 S.E. 875, 878 (Va. 1897) ("Where parties in good faith differ as to their rights, and resort to law to settle their differences, the law has prescribed what costs should be taxed, and what shall be therein included as the fee of the winning party. In such case no greater fee should be allowed to be proved or recovered.").

Courts in the 20th century continued to develop the same themes. The Arizona Supreme Court, for example, reaffirmed that "the law does not desire to throw around the right of a party to appeal to the courts such risks that a fear of the result might deter him from asserting a claim in which he has an honest belief." *Ackerman v. Kaufman*, 15 P.2d 966, 967 (Ariz. 1932). Courts have power to award only "the very meager costs allowed" by statute, the court explained, because "the honest plaintiff should not be frightened from asking the aid of the law by the fear of an extremely heavy bill of costs against him should he lose." *Id.*

This Court continued to uphold the American Rule for the same reasons, concluding that "one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

Without the American Rule, the Court explained, "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Id.*

This long line of state and federal decisions explains why the American Rule is the American Rule. Courts throughout the country have rejected England's "loser pays" rule because imposing such a rule by judicial fiat would overstep the courts' limited role and could deter litigants—especially the poor—from asserting good claims or defenses in court.

III. In keeping with the American Rule, this Court has held that nontaxable expenses such as expert fees will be exacted from the losing party only with express statutory authorization.

Consistent with the decisions above, this Court has determined that the general cost statutes enacted by Congress limit the costs that may be recovered by prevailing parties in federal court—unless Congress *explicitly* directs otherwise.

In *Alyeska*, the Court rejected the idea that district courts have inherent power to award attorneys' fees to a prevailing party who acts as a "private attorney general." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 241 (1975). To grant courts such power, the Court explained, would be "to fashion a far-reaching exception to th[e] 'American Rule'"—a rule "deeply rooted in our history and in congressional policy." *Id.* at 247, 271. While noting

that "Congress has made specific provision for attorneys' fees under certain federal statutes," the Court reasoned that Congress "has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute." *Id.* at 254-55. "Nor has [Congress] extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.* at 260. To the contrary, the Court concluded, "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine" and "it is not for us to invade the legislature's province by redistributing litigation costs in th[is] manner." *Id.* at 262, 271.

The Court then addressed courts' power to shift expert witness fees in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). The district court ruling under review had held that Federal Rule of Civil Procedure 54(d)—which then provided that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs"—gave the court discretion to award expert fees in excess of the $30-per-day witness fee allowed by 28 U.S.C. §§ 1920 and 1821(b). *Id.* at 439, 441 (citation omitted). But this Court disagreed. The district court's reading of Rule 54(d), the Court explained, would leave the general cost statutes "entirely without meaning," and the Court would "not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) *or any other provision not referring explicitly to* [*expert*] *witness fees*"—"regardless of the priority of

enactment." *Id.* at 441, 444-45 (emphasis added) (citation omitted). So the Court put in place a bright-line rule: "[A]bsent explicit statutory ... authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.* at 445.

The Court then applied the bright-line rule in *Casey*, holding that 28 U.S.C. § 1988's allowance of an "attorney fee" did not supply "the 'explicit statutory authority'" necessary to shift expert fees to the losing party. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 87 (1991); *see also id.* at 87 n.3 (noting "the same is true of the word 'costs' in § 1988"). Sections 1920 and 1821, the Court reaffirmed, "define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further." *Id.* at 86.

And so again in *Murphy*, the Court applied *Crawford Fitting*'s clear-statement test to conclude that a provision in the Individuals with Disabilities Education Act (IDEA) allowing courts to "award reasonable attorneys' fees as part of the costs" did not allow prevailing parents to recover expert fees. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 293-94 (2006). *Murphy* reiterated that "*no statute* will be construed as authorizing the taxation of" litigation expenses other than those enumerated in § 1920 "unless the statute 'refer[s] explicitly to'" those categories of expenses. *Id.* at 301 (emphasis added); *see also id.* at 298 (noting that "'costs' is a term of art" that "obviously" refers to "the list set out in 28 U.S.C. § 1920" and "§ 1821" (citation omitted)).

The Court's reasoning in *Crawford Fitting*, *Casey*, and *Murphy* largely rested on statutory interpretation, not the American Rule per se. *See, e.g.*, *Crawford Fitting*, 482 U.S. at 441, 449 (discerning "[t]he logical conclusion from the language and interrelation" of Rule 54(d), § 1821, and § 1920 and applying the "specific vs. general canon" of statutory construction); *Casey*, 499 U.S. at 88, 92 (concluding from the "record of statutory usage" that "attorney's fees and expert fees are regarded as separate elements of litigation cost," for otherwise "dozens of statutes referring to the two separately [would] become an inexplicable exercise in redundancy"); *Murphy*, 548 U.S. at 296-303 (concluding from the statutory text, as well as the reasoning of *Crawford Fitting*, that the IDEA does not authorize courts to shift expert fees to prevailing parents).

But this trilogy of decisions is also informed by—and grounded in—the American Rule. The clear-statement requirement first established in *Crawford Fitting* and then applied in *Casey* and *Murphy* is rooted in Congress's longstanding "rigid controls on cost-shifting in federal courts'" and the recognition that courts are not empowered "to evade [a] specific congressional command" in this area. *Crawford Fitting*, 482 U.S. at 442, 444. And the rule's default choice—that "costs" means *taxable* costs unless Congress says otherwise—ensures that plaintiffs and defendants alike need not fear that advancing a good-faith claim or defense may subject them to crushing liability for the other side's nontaxable litigation expenses.

In short, *Crawford Fitting*, *Casey*, and *Murphy* promote the separation of powers and longstanding practice by declining to infer "a bold departure" from the American Rule absent "explicit statutory language." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

IV. The bare term "full costs" in § 505 of the Copyright Act does not warrant departing from the American Rule and the limited set of taxable costs specified by Congress.

Section 505 of the Copyright Act allows district courts to award a "reasonable attorney's fee," but does not specifically authorize any other kind of nontaxable expense. 17 U.S.C. § 505. Nothing in the provision refers, for example, to expert fees, jury consulting fees, or e-discovery expenses. Nor, as this Court has already made clear, does the term of art "costs" encompass such nontaxable expenses. To the contrary, "§ 1920 defines the term 'costs'" for purposes of federal law. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987). As in *Alyeska*, *Crawford Fitting*, *Casey*, and *Murphy*, this Court is yet again "asked to hold that a specific congressional enactment on the shifting of litigation costs is of no moment." *Id.* at 444.

The Ninth Circuit's contrary decision in *Twentieth Century Fox* was wrong. Despite recognizing that "*Crawford Fitting* instructs us to carefully inspect § 505 for clear evidence of congressional intent that non-taxable costs should be available," the Ninth Circuit quickly concluded that "full" must mean any and all expenses, including any

type of nontaxable expense. *Twentieth Cent. Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005) ("[W]e think that there can be no other import to the phrase 'full costs' within § 505."). In its haste, the Ninth Circuit apparently did not consider that "full costs" simply means the full amount of taxable costs, as opposed to two-thirds, double, or treble costs (as were available under some state cost-shifting provisions at the time). *See* Pet. Br. 42-44.

As the Eighth Circuit correctly recognized, nothing about "the 'full costs' language 'clearly,' 'explicitly,' or 'plainly' evidences congressional intent to treat 17 U.S.C. § 505 costs differently from costs authorized in other statutes." *Pinkham v. Camex, Inc.*, 84 F.3d 292, 295 (8th Cir. 1996) (per curiam). "Full costs" means full taxable costs, nothing less and nothing more.

This reading of § 505 best comports with the American Rule and the carefully considered departures from that rule embodied in the federal cost statutes. As Justice Goldberg aptly put it: "It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means." *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 237 (1964) (Goldberg, J., concurring). By requiring explicit statutory authorization before shifting nontaxable expenses to the losing party in copyright cases, this Court preserves this deliberate choice and respects the respective roles of the judicial and policy-setting branches.

Of course, if Congress ever decides to shift expert fees and other nontaxable expenses to the losing party in copyright cases (as it has done with attorneys' fees), it can easily do so. But until Congress explicitly acts, this Court should adhere to the American Rule and hold that § 505 allows district courts to award full *taxable* costs and nothing more.

CONCLUSION

By forcing parties to litigate under peril of ruinous costs awards on the basis of vague statutory text, the Ninth Circuit's decision undermines the American Rule, the separation of powers, and access to justice. The decision below should be reversed.

Respectfully submitted,

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